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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 278

UNITED STATES OF AMERICA,

vs.

CHESTER WILLIAM STUPAK.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Chester William Stupak, prays that the Court grant a rehearing on the Petition for Certiorari which was denied on October 11, 1965. In support of his prayer, petitioner submits that substantial grounds not previously presented are available in support of rehearing and that this petition is confined to such additional grounds as appears more fully hereinafter.

ADDITIONAL QUESTIONS PRESENTED

1. Was there competent proof that petitioner was engaged in the business of accepting wagers?

2. Did the trial court permit the reception of incompetent "expert" testimony?

3. Did the trial court err in refusing petitioner the right to correct an untruthful statement of the prosecuting witness inferring that petitioner had been convicted in a state court trial?

REASONS FOR GRANTING REHEARING

1. There was no competent proof that defendant was engaged in a business of accepting wagers.

As pointed out in *Rahke v. United States,* 180 F. Supp. 576, 149 Ct. Cl. 33, the test of whether one is engaged in wagering is whether he is risking his money in a game of chance in which he may win or lose depending on the eventuality. Although the evidence recited above may have been sufficient to show that defendant was associated as a principal with Katz in an activity described as a numbers business, there was no competent proof that such was a business of accepting wagers as above defined and as required by the Act. That the operation of a numbers business is a game of chance with a wagering aspect is not such a matter of common knowledge as to eliminate the need for proof. The correctness of the foregoing proposition is demonstrated in this case by the calling on behalf of the government of an expert witness whose role was to explain to the jury the methods and workings of numbers lotteries (16a). His testimony (discussed below) was not competent but if competent was not given in relation to defendant and in any event the government offered no proof that defendant's alleged business had the characteristics described by the expert. Proof that wagering was involved was supplied neither by the admission of the defendant—which went to his being in a "numbers" business—nor by corroborating evidence of the confiscation of cash and numbers slips coinciding with the arrests of persons Katz or Stupak had identified to James as being their writers. No transmittals of funds to the alleged principals, no headquarters operations and no

pay-offs were shown. What was done with slips or cash does not appear. The nature of the business was not proved.

Therefore, the determination that defendant was in the business of accepting wagers is sustainable on this record only if it can be properly said — first, that all so-called numbers business have the characteristics as described by the government's expert, or second, that by designating an activity as a numbers business the government is entitled to a presumption that wagers are being accepted without having to prove that to be so. To allow the result in either ground would, we believe, negate the idea that every element of the crime charged against defendant was required to be proved beyond reasonable doubt.

2. The Court erred in receiving the testimony of Edward Zelik.

This man was a ten-year employee in the Intelligence Division of the Internal Revenue Service and had participated in investigations relating to numbers lotteries. He was called as an expert "regarding the methods of number lotteries and how they work so that the jury can understand how they work, and the different organizational structures of a numbers lottery" (16a). Objection to this offer was overruled (16a). On direct, the witness gave a lengthy exposition covering, *inter alia*, what is meant by playing a number, the difference between the "stock" and the "race" number, how to play a number—straight or in combination, the odds, what is a writer and how he is paid, what is a pick-up man and how he is paid, what is a banker, about "spread-

ing the risk" and other similar matters. The numbers lotteries described by him involved accepting wagers.

While the foregoing testimony tended to create a picture of large-scale numbers operations existing in many variations in the Pittsburgh area in 1957, it was not offered as describing the operation the government claimed the defendant had. However, the characteristics of illicit numbers operations, in general, was not germane or proper in proof of the specific charges made against the defendant, and could only serve to precondition or prejudice the minds of the jurors against the defendant. The record is barren of any proof by which this harmful testimony can be shown to have relevance to the present prosecution. Its real function was to camouflage and cover the complete absence of proof that the activities of the defendant as shown by the government constituted a business of accepting wagers. The fact that others were in such a business was not relevant. Zelig's testimony should have been excluded as being irrelevant and incompetent.

The present prosecution was wholly unlike the situation outlined in *United States v. Whiting,* 4 Cir., 311 F. 2d 191, certiorari denied 372 U. S. 935, rehearing denied 372 U. S. 972. In that case experts were permitted to express an opinion that the activities of the *defendants,* which they witnessed, and which were outlined in the evidence, constituted the operation of a lottery. 311 F.2d at 197.

No similar or proper purpose was served by the use of expert testimony in this case. Even if not so intended by the government, introduction of such testimony made it difficult or impossible for the jury to determine

whether on the relevant facts in evidence the defendant was shown to be involved in a type of business included under the statute.

Similar expert testimony was held to be improper in *United States v. Sette,* 2 Cir. 334 F. 2d 267, 269. There was in that case proof of a business of receiving wagers from bettors but no direct evidence that defendant had a proprietary interest in the gambling operation. The trial Court permitted two revenue agents to give expert testimony, on the basis of their observations and general knowledge, that Sette had a proprietary interest in the operation. In reversing the judgment, the Court of Appeals pointed out that those in charge of the investigation had not chosen to seek direct proof of the nature of defendant's involvement and having failed to do so:

> "* * * could not remedy this obvious defect in proof by assuming the role of experts and stating their opinions on what they had to prove. We are cited to no case, and have found none, that remotely justifies this highly unusual method of establishing a *prima facie* case in a criminal prosecution of this type."

3. The Court erred in refusing defendant's attorney the opportunity to correct an untruthful or malicious statement by James on cross examination inferring that the defendant had been convicted in a State Court trial.

In 1958, the defendant and Katz had been tried in a State Court trial of charges *inter alia,* of bribery, operating a lottery and conspiracy, on the basis of the same transactions involved in this case. They were acquitted. Even before the trial began the United States attorney sought to obtain a ruling that before the prior proceedings be brought up there should be a side bar conference (T. 3-T. 7). When it became necessary to refer to the result of the State Court trial, defendant's counsel requested permission to do so. The following occurred during cross examination (152a-153a):

"Q. All right Sir, And, you went on in the matter that you have discussed here, and you are the only person in the world who knows for certain the exact sums of money that you received?

A. Well, along with the co-conspirators in the case. I guess they know as well as I do.

Q. Who are your co-conspirators?

Mr. Reich: Objection.

The Court: Rephrase the question, Mr. Moses.

By Mr. Moses:

Q. Who are you referring to as co-conspirators? Somebody who is doing something with you?

A. No. The ones that was guilty of the conspiracy, the conspiracy of bribe.

Q. In your judgment, they were guilty of conspiracy?

A. Do you want me to answer that?

Mr. Moses: Now, your Honor, I would ask leave of the Court to refer to the trial in the State Court.

The Court: Now, this is on the basis of your own cross examination.

Mr. Reich: That is the basis of my objection, your Honor. He can't set it up like that.

The Court: Objection sustained."

It is obvious that the witness himself created an impression that the defendant had been convicted of a conspiracy. Counsel for the defendant was not responsible for the kind of answer the witness decided to make to the question. After James had insinuated that the defendant had been convicted which was untrue, it was certainly necessary and proper to correctly show the facts. It was an error for the Court to withhold permission. It was contrary to a sense of fair play that the United States Government would, as it did, prevent the correction of an unfair state of the record.

CONCLUSION

On the basis of the foregoing, your petitioner prays for rehearing on the petition for certiorari.

Respectfully submitted,

JOHN E. EVANS, SR.
PAUL E. MOSES
Attorneys for Petitioner

CERTIFICATE

I certify that the foregoing petition for rehearing is presented in good faith and not for delay and is confined to grounds believed to be substantial and not previously presented.

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PAUL E. MOSES